No. 454

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA AND ATOMIC ENERGY COMMISSION, PETITIONERS

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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In opposing review, respondent unions contend that the decision of the court of appeals does not have the broad reach that we ascribe to it, but turns upon the particular facts of this case. Specifically, they urge (Br. in Op. 11–14) (1) that the court below did not hold that the Commission must make the same safety findings to authorize construction of a reactor as it must make to authorize operation, but held merely that the Commission did not here make the findings that it has made in granting other construction per-

mits, since it failed to make "a reasonably clear finding, as to *any* assurance" of ultimate operating safety; and (2) that the ruling below that the Commission cannot authorize construction of a nuclear reactor near a populated area without finding "compelling reasons" for such location, was *"not a holding, and was not a factor in the decision"* (Br. in Op. 19, emphasis in original). Neither contention has merit.[1]

1. At the outset of its discussion of "Safety Findings Required by the Atomic Energy Act," the court of appeals posed the issue before it with respect to the kind of safety findings the Commission must make in granting a construction permit as follows (Pet. No. 454 ("Pet."), pp. 35–37, emphasis in original):

> Petitioners contend that "The Act and the regulations of the Commission * * * require, as conditions precedent to the issuance of every construction permit for an atomic energy power reactor, that *as of the time the construction permit is issued* the Commission find that (1) it has reasonable assurance that the reactor may be constructed *and operated* at the proposed site without undue risk to the health and safety of the public * * *."
>
> It is undisputed that the Commission must make such a finding when it authorizes operation. The question is whether it must make such a finding when it authorizes construction. In our opinion it must.

The court's conclusion that the Commission "must" make the *same* safety findings "when it authorizes con-

[1] Respondents' contention (Br. in Op. 21–27) that the court below correctly held that they had standing to maintain this action is, we believe, fully answered in our petition (pp. 28–29).

struction" as it makes "when it authorizes operation" rested primarily upon the court's interpretation of the legislative history of the Atomic Energy Act of 1954 (Pet. 37–39). In the court's view, this history indicated that "the Act * * * require[s], as a condition to the issuance of a construction permit, a finding that the proposed facility can be operated without undue risk to the health and safety of the public" (*id.* at 39). This finding, as the court had already pointed out, is the same finding that the Act requires for the issuance of an operating license. The court thus ruled that the findings which the Commission "must" make "when it authorizes construction" are the same as it "must" make "when it authorizes operation." As we pointed out in our petition (pp. 19–28), this erroneous construction of the Act would seriously impede the government's program for the development of nuclear power reactors.

Respondents attempt to avoid this statutory holding by arguing that although the Commission, in the eight other cases in which it has granted construction permits for developmental power reactors, found that there was reasonable assurance that a reactor of the type proposed could be operated at the particular site without undue risk to public health and safety, it did not make such a finding here. Even if correct, this argument would not meet our point that the decision below enunciates a serious general misconstruction of the statute which should be corrected; in any event, respondents' contention is factually incorrect.

Respondents cannot, and do not, deny that the Commission here made the precise finding required by its

regulation for granting a construction permit, namely, that there was "reasonable assurance"

> that a utilization facility of the general type proposed in the PRDC Application and amendments thereto can be constructed and operated at the location without undue risk to the health and safety of the public [Finding 22, Tr. 7020].

This is the same finding that the Commission made in granting the eight other construction permits for developmental reactors that it has hitherto authorized, as well as those for most research and testing reactors.

The sole basis upon which respondents attempt to distinguish the finding of "reasonable assurance" here from the same finding made in the eight other cases is that here the finding recited that it was made "for the purposes of this provisional construction permit" (Tr. 7020). That recital, however, plainly was not intended to, and did not, derogate in any way from the basic finding, reiterated several times without the recital (Tr. 6971, 6983–6984, 7022–7023), that there was reasonable assurance that a reactor of this general type could be *operated* at this site without undue risk to public health and safety. Its purpose was merely to reemphasize, and to make particularly explicit, in the Commission's first contested reactor construction licensing case, that the grant of the PRDC construction permit was not to be taken as any indication that the safety findings there made would of themselves also justify an operating license. Indeed, whenever the Commission finds, in issuing a construction permit, that there is reasonable assurance that a facility of the type proposed can be operated consistent with the

public health and safety, such finding necessarily is made for the purposes of the particular construction permit involved. Under the express terms of the Commission's regulation, another safety finding relating to the particular reactor's "final design" (as distinguished from "the general type" proposed) will be required before an operating license will be issued. Accordingly, the use in this case of the phrase "for the purposes of this provisional construction permit" merely made explicit what is inherent in every grant of a construction permit—and did nothing more.

2. Although respondents now attempt to minimize the significance of the court of appeals' ruling on "compelling reasons" as neither a "holding" nor "a factor in the decision" (Br. in Op. 19), we believe that the opinion below purports to announce the general rule that the Atomic Energy Act precludes the Commission from locating a reactor near a heavily populated area without "compelling reasons" therefor. After first holding that the Commission's "findings regarding safety of operation are ambiguous" (Pet. 43), the court went on to hold (*ibid.*) that "the Commission's safety findings are deficient in an additional respect." The additional respect in which such findings were "deficient" was that, although "Congress intended no reactor should, without compelling reasons, be located where it will expose so large a population to the possibility of a nuclear disaster[, i]t does not appear that the Commission found compelling reasons or saw that such reasons were necessary" (Pet. 44). After reviewing the Commission's finding with respect to site safety (Pet.

44–45), the court concluded: "We think this finding clearly insufficient" (Pet. 45). The court then went on to say (*ibid.*), by way of dictum: "We need not consider whether even the most compelling reasons for preferring this location could support a finding that the reactor could be operated at this location without 'undue' risk, or with 'adequate' protection, to the health and safety of the public."

On its face, therefore, the court of appeals' opinion enunciated the general rule, which it believed "Congress intended," that the Commission cannot locate a nuclear reactor near a populated area "without compelling reasons." As we demonstrated in our petition (pp. 12–19), engrafting such a requirement on the Atomic Energy Act—a requirement not contained in the statute and, we believe, refuted by the legislative history—would seriously interfere with the Congressional purpose of encouraging and furthering, with due protection to the public health and safety, the development of the peaceful uses of atomic energy.

For the reasons stated in the petition and in this memorandum it is respectfully submitted that the petition for a writ of certiorari should be granted.

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